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THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**Anita Redd**, on behalf of her minor son, **Russell Horning**, also known as Backpack Kid; and **RH Performer, LLC**, a Georgia limited liability company,

## Plaintiffs.

1

**Take-Two Interactive Software, Inc.**, a Delaware corporation; **2K Sports, Inc.**, a Delaware corporation; **2K Games, Inc.**, a Delaware corporation; **Visual Concepts Entertainment**, a California Corporation; and **Does 1 through 50**, inclusive,

## Defendants.

Case No.2:18-cv-10441

## Complaint for:

1. Direct Infringement of Copyright;
2. Contributory Infringement of Copyright;
3. Violation of the Right of Publicity under California Common Law;
4. Violation of the Right of Publicity under Cal. Civ. Code § 3344;
5. Unfair Competition under Cal. Bus. & Prof. Code § 17200, et seq.;
6. False Designation of Origin under 15 U.S.C. § 1125(a);
7. Trademark Infringement under California Common Law
8. Trademark Infringement under 15 U.S.C. § 1125(a);
9. Trademark Dilution under 15 U.S.C. § 1125(c)

## Demand for Jury Trial

1 Plaintiffs Anita Redd, on behalf of her minor son, Russell Horning,  
2 also known as Backpack Kid (“Backpack Kid”), and RH Performer, LLC  
3 (collectively referred to as “Plaintiffs”), by and through their  
4 undersigned counsel, assert the following claims against Defendants  
5 Take-Two Interactive Software, Inc. (“Take-Two”), 2K Sports, Inc. (“2K  
6 Sports”), 2K Games, Inc. (“2K Games”), Visual Concepts Entertainment  
7 (“Visual Concepts”), and Does 1 through 50 (collectively referred to as  
8 “Defendants”), and alleges as follows:

## 9 **I. OVERVIEW**

10 1. Through their unauthorized misappropriation of Backpack  
11 Kid’s highly popular signature dance, the “Floss,” in their video games,  
12 NBA 2K18 (“2K18”) and NBA 2K19 (“2K19”), Defendants have unfairly  
13 profited from exploiting Backpack Kid’s protected creative expression,  
14 likeness, and Plaintiffs’ trademark without consent or authorization.

15 2. Backpack Kid is a professional performer, who created the  
16 Floss dance in 2016, which exploded in popularity following his  
17 performance of the dance on Saturday Night Live on May 20, 2017,  
18 alongside Katy Perry. The Floss is now inextricably linked to Backpack  
19 Kid and has continued to be a part of his celebrity persona.

20 3. Defendants capitalized on Backpack Kid’s celebrity and the  
21 Floss’s popularity, particularly with its younger fans, by selling the  
22 Floss as an in-game dance (called emote) in 2K18 under the name  
23 “Backpack.” In 2K18’s MyCareer Lab players can unlock and then  
24 purchase the Backpack emote (described as a “Signature Animation”)  
25 to customize their 2K MyCareer avatars. Defendants also include at  
26 least one Backpack emote in 2K19. Defendants did not credit Backpack  
27 Kid nor seek Plaintiffs’ consent to use, display, reproduce, sell, or create  
28 a derivative work based upon Backpack Kid’s Floss dance or likeness in

1 2K18 or 2K19. Defendants also did not seek Plaintiffs' consent to use  
2 the term Backpack as the name for the emotes.

3 4. Defendants' NBA 2K franchise is the most popular sports  
4 video game franchise in the world. Indeed, 2K18 was the highest selling  
5 sports game of 2017 and the second highest-selling game overall. In  
6 addition to profits obtained from selling 2K18 – the game retails for  
7 \$59.99 at release for the base edition and \$79.99 for the Michael Jordan  
8 special edition – Defendants also profit from in-game purchases within  
9 2K18. Defendants should not be able to profit from Backpack Kid's  
10 fame, hard work, and creativity by its intentional misappropriation of  
11 Plaintiffs' original content, likeness, name, and trademark. Plaintiffs  
12 seek injunctive relief and damages, including, but not limited to,  
13 Defendants' profits attributed to its improper use of Backpack Kid's  
14 Floss dance, the Backpack title, and Backpack Kid's likeness.

## 15 II. THE PARTIES

16 1. Russell Horning resides in Lawrenceville, Georgia. He is  
17 better known as the performer, Backpack Kid.

18 2. Anita Redd, who brings this lawsuit on behalf of Backpack  
19 Kid, is Backpack Kid's mother. Redd also resides in Lawrenceville,  
20 Georgia

21 3. RH Performer, LLC is a Georgia limited liability company  
22 with its principal place of business at 745 Dean Way, Lawrenceville, GA  
23 30044. RH Performer, LLC submitted applications for copyright  
24 registrations for the Floss dance.

25 4. Take-Two Interactive Software, Inc. is a Delaware  
26 corporation with its principal place of business at 110 West 44th Street,  
27 New York, NY 10036.

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5. 2K Sports, Inc. is a Delaware corporation with its principal place of business at 10 Hamilton Landing, Novato, CA 94949. 2K Sports is a subsidiary corporation of Take-Two.

6. 2K Games, Inc. is a Delaware corporation with its principal place of business at 10 Hamilton Landing, Novato, CA 94949. 2K Games is a subsidiary corporation of Take-Two.

7. Visual Concepts Entertainment is a California corporation with its principal place of business at 10 Hamilton Landing, Novato, CA 94949. Visual Concepts is a subsidiary corporation of 2K Games. Alongside 2K Games, Visual Concepts is the creator and developer of the NBA 2K franchise, which was first released in 1999.

8. The true names and identities of the defendants herein sued as Does 1 through 50, inclusive, are unknown to Plaintiffs, who therefore sue those defendants by such fictitious names. When the true names of those defendants have been ascertained, Plaintiffs will amend this complaint accordingly. Each of the defendants aided and abetted and is responsible in some manner for the occurrences herein alleged, and Plaintiffs' injuries were proximately caused thereby.

9. At all times herein mentioned, each of the defendants was acting as an agent, servant, employee or representative of defendants, and, in doing the things alleged in this Complaint, was acting within the course and scope of that agency, service, employment, or joint venture.

### **III. SUBJECT MATTER JURISDICTION AND VENUE**

10. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 28 U.S.C. § 1367 (supplemental jurisdiction).

1       11. Venue is proper in this District under A) 28 U.S.C. §  
2 1391(b)(2) (federal question jurisdiction), because a substantial part of  
3 the events or omissions giving rise to the claim occurred in this District;  
4 and B) 28 U.S.C. §§ 1391(b)(1) and (c) (personal jurisdiction), because  
5 all defendants are subject to personal jurisdiction in this State and at  
6 least one in this District.

#### 7                   **IV. FACTUAL BACKGROUND**

##### 8                   **A. Backpack Kid and the Creation of the Floss**

9       12. Raised in the city of Lawrenceville, Georgia, Backpack Kid  
10 began gaining popularity in 2016 for posting videos of himself dancing  
11 on Instagram. Backpack Kid exploded in popularity after the world-  
12 famous singer, Rihanna, posted one of his videos; Backpack Kid gained  
13 55,000 followers on Instagram in two days after the Rihanna post.

14       13. After obtaining widespread notoriety, Backpack Kid  
15 continued to post videos of himself dancing on Instagram. As part of  
16 his dances, Backpack Kid included his signature move that he originally  
17 called “The Russell.” Indeed, most of Backpack Kid’s videos included  
18 Backpack Kid performing The Russell either by himself or with others.

19       14. Backpack Kid’s popularity further increased after his May  
20 2017 Saturday Night Live performance with Katy Perry where he  
21 performed his signature dance. Katy Perry has stated that she invited  
22 Backpack Kid to perform with her after discovering Backpack Kid’s  
23 popular Instagram page. The public began referring to Backpack Kid  
24 by his moniker after the Saturday Night Live performance because he  
25 performed the dance while wearing a backpack.

26       15. Backpack Kid also performed his signature dance in Katy  
27 Perry’s 2017 “Swish Swish” music video, which was posted to YouTube

1 on August 24, 2017.<sup>1</sup> At the time of this filing, the Swish Swish music  
 2 video has over 508 million views on YouTube.

3 16. Since its creation in 2016 and its rise to fame soon after,  
 4 Backpack Kid's dance maintained its popularity. Videos of the dance,  
 5 now known as the "Floss" or "Flossing," gained widespread attention  
 6 and notoriety, particularly on social media. Hundreds of thousands of  
 7 fans, including celebrities and athletes, have posted videos of  
 8 themselves Flossing on social media. Since the Floss's creation,  
 9 Backpack Kid has used and continues to successfully use the Floss  
 10 commercially.

11 17. The Floss has become synonymous with Backpack Kid, who  
 12 is unanimously credited with creating the dance. Backpack Kid is  
 13 constantly inundated with requests to perform the Floss; he has  
 14 performed it on numerous occasions at the behest of both the public and  
 15 celebrities, including at schools, companies, and other locations around  
 16 the world. Accordingly, the Floss is a part of Backpack Kid's celebrity  
 17 identity and the dance's unique movements readily evoke a connection  
 18 to Backpack Kid. Plaintiffs also have copyrights in the Floss dance and  
 19 trademark rights in the "Floss" and "Backpack Kid."

20 **B. The NBA 2K Franchise and the Rise of  
 21 Microtransactions**

22 18. The NBA 2K franchise is an annual series of basketball  
 23 video games modeled after the National Basketball Association  
 24 ("NBA"). The NBA 2K series consists of 18 annual installments and  
 25 four spinoff games. Visual Concepts has been the developer of each of  
 26 the games since inception; Sega Games Company, Limited was the  
 27

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28 <sup>1</sup> The video can be found at <https://www.youtube.com/watch?v=iGk5fR-t5AU>.

1 publisher of the first six games before selling Visual Concepts to Take-  
2 Two, who later created the 2K Sports and 2K Games subsidiaries.  
3 Take-Two, 2K Sports, 2K Games and Visual Concepts have been the  
4 creators and publishers of the franchise since NBA 2K6, released in  
5 2005.

6 19. Although significantly more complex now, the original “NBA  
7 2K” video game was comparatively simple. The game, released on  
8 November 10, 1999 for the Dreamcast console, features teams from the  
9 1999-2000 NBA season. Players can play as any of those teams, or  
10 players from those teams, in head-to-head matchups against another  
11 player or a computer program. Players can also create their own  
12 players and teams. The game did not have online capability, nor did it  
13 offer in-game purchases.

14 20. The two subsequent video games, “NBA 2K1” and “NBA  
15 2K2,” were largely similar to the first iteration. The fourth installment,  
16 ESPN NBA Basketball – the only game in the series not to feature “2K”  
17 in the title – was the first game to introduce a career mode where  
18 players can create their own character and play as that character in  
19 various game modes. The game was also the first in the series to feature  
20 online game modes.

21 21. NBA 2K10, released in October 2009, advanced the series’  
22 career mode feature. Then called MyPlayer, the career mode feature  
23 allowed players to create a personalized character by customizing the  
24 character’s physical and personal traits, including, position, play style,  
25 jersey number, name, age, body type, hair, facial features, and tattoos.  
26 The feature also allows users to “spend” skill points earned during  
27 MyPlayer games to further improve the character’s skills.

28

1       22. NBA 2K14, released in October 2013, was the first  
2 installment to introduce microtransactions to the MyPlayer mode,  
3 which was renamed MyCareer. In addition to earning currency through  
4 gameplay, the game began allowing players to purchase “Virtual  
5 Currency” or “VC” with real money. For example, in NBA 2K18,  
6 Defendants offered five pricing levels for purchasing Virtual Currency:

7           1) 15,000 VC for \$4.99;  
8           2) 35,000 VC for \$9.99;  
9           3) 75,000 VC for \$19.99;  
10           4) 200,000 VC for \$49.99; or  
11           5) 450,000 VC for \$99.99.

12       23. VC can be spent on MyCareer attributes, uniforms, apparel,  
13 signature movements and dances.

14       24. Although controversial, as purchasers already spent the  
15 retail cost of around \$60 to purchase 2K games, the in-game  
16 microtransactions became a lucrative source of additional revenue for  
17 Defendants. As a result, Defendants began offering more options  
18 through microtransactions in subsequent installments, including  
19 dances. The more complicated the dance, the more it costs to purchase.

20       25. In NBA 2K16, released on September 29, 2015, Defendants  
21 copied the dances and movements of numerous performers, including,  
22 among others, Alfonso Ribeiro’s famous dance performed on *The Fresh*  
23 *Prince of Bel-Air* television show (named “So Fresh” in game), the  
24 “Whip” dance created by the Atlanta hip hop group, “We Are Toonz,” in  
25 2013 (also named “Whip” in game), the “Cat Daddy” dance created by  
26 the hip hop group, “The Rej3ctz,” in 2010 (named “Cat Daddy” and  
27 “Rollin” in game), the “Thriller Dance” created by Michael Jackson in  
28 his “Thriller” music video in 1982 (named “Spiller” in game), the “Soulja

1 Boy” dance created by the hip hop artist, “Soulja Boy,” in 2007 (named  
2 “Soul Jah Boi” in game), the “Nae Nae” dance created by “We  
3 Are Toonz,” in 2013 (also named “Nae Nae” in game), and the  
4 “Schmoney Dance” created by the hip hop artist, Bobby Shmurda, in  
5 2014 (named “Dip” in game).

6 26. Upon information and belief, although Defendants  
7 presumably obtained licenses from athletes to use their likenesses and  
8 voices, Defendants did not seek consent or authorization from these  
9 artists to use any of these movements or dances. Defendants also did  
10 not obtain consent to use the names of the dances that these artists  
11 created.

12 27. Moreover, Defendants also misappropriated other popular  
13 dances, including Backpack Kid’s Floss dance, in NBA 2K17, NBA 2K18  
14 and NBA 2K19. Upon information and belief, Defendants did not seek  
15 consent or authorization to use any of these movements of dances.

16 28. Dances, or emotes, are incredibly popular and provide  
17 significant additional revenue to the NBA 2K franchise. Indeed, in  
18 2K14, when Defendants first introduced VC, user spending increased  
19 by about 150% compared to NBA 2K13 with spending on Virtual  
20 Currency making up 92% of the increase. Using Virtual Currency,  
21 players purchase dances, alongside clothing, to personalize their  
22 gaming experience. Moreover, players routinely purchase Virtual  
23 Currency to avoid the tedious process of earning Virtual Currency  
24 through gameplay. Indeed, in NBA 2K18, players are given only 6,000  
25 VC to start, and players earn less than 500 VC for each game played on  
26 MyCareer. As dances routinely cost over 1,000 VC, Defendants  
27 intentionally offer considerably low amounts of VC through gameplay  
28 in order to incentivize players to purchase VC instead.

1       29. Upon information and belief, Defendants will likely continue  
 2 adding popular dances/emotes to the 2K games without the artists' or  
 3 creators' consent or approval to attract more players and add to its ever-  
 4 growing revenue.

5       **C. Unauthorized Use of the Floss in NBA 2K18 and NBA**  
 6       **2K19**

7       30. On September 19, 2017, Defendants released NBA 2K18 on  
 8 the Microsoft Windows, iOS, Android, PlayStation 4, PlayStation 3,  
 9 Xbox One and Xbox 360 platforms. Defendants priced the game at  
 10 \$59.99. As part of the game, in the MyCareer mode, Defendants added  
 11 several new emotes. Among these new emotes, Defendants added the  
 12 "Backpack." To obtain this dance, players must spend 2,250 VC.

13       31. Moreover, on September 7, 2018, Defendants released NBA  
 14 2K19 for all platforms, which also offered the Backpack.

15       32. As the names indicates, the Backpack emote copies the  
 16 Backpack Kid's Floss dance. If purchased, the 2K MyCareer avatar can  
 17 perform the dance during gameplay. Despite using the dance's name,  
 18 and consequently his name, Defendants did not seek to obtain Plaintiffs'  
 19 authorization or consent. Moreover, Plaintiffs did not give Defendants  
 20 express or implied consent for its use of Backpack Kid's likeness, his  
 21 name, or the Floss dance. Defendants also did not compensate  
 22 Plaintiffs.

23       33. Upon information and belief, Defendants added the  
 24 Backpack to intentionally exploit the popularity of Backpack Kid and  
 25 the Floss dance without providing Plaintiffs any form of compensation.

26       34. Defendants profited from their improper misappropriation  
 27 of the Backpack Kid name and Floss dance and Backpack Kid's likeness  
 28 by, *inter alia*: 1) selling the infringing Backpack emote directly to

1 players; 2) selling NBA 2K18 and NBA 2K19 that contain the Backpack  
2 emote; 3) advertising the Backpack emote to attract additional players,  
3 including Backpack Kid's fans or those persons familiar with the Floss  
4 to play NBA 2K18 and NBA 2K19 and make in-game purchases; 4)  
5 keeping the franchise relevant to its players to incentivize those players  
6 to continue purchasing the 2K games; 5) impliedly representing that  
7 Plaintiffs consented to Defendants' use of his likeness; 6) erroneously  
8 causing the association of NBA 2K18 and NBA 2K19 with Backpack Kid  
9 and the Floss; 7) creating the false impression that Plaintiffs endorsed  
10 NBA 2K18 and NBA 2K19; and 8) inducing and/or contributing to NBA  
11 2K18 and NBA 2K19 players' characters performing the Floss dance.

12 35. Upon information and belief, Defendants actively and  
13 knowingly directed, caused, induced, and encouraged others, including,  
14 but not limited to, their players, designers, suppliers, distributors,  
15 resellers, software developers, and repair providers, to misappropriate  
16 Backpack Kid's likeness, name, and Floss dance.

17 36. By adding microtransactions to their popular 2K franchise,  
18 Defendants have substantially increased their profits by unlawfully and  
19 unfairly misappropriating Backpack Kid's and other artists' creative  
20 expression, likenesses, and trademarks without crediting or  
21 compensating these artists. Plaintiffs thus bring this lawsuit to prevent  
22 Defendants from further using Backpack Kid's likeness and the  
23 Backpack Kid name and Floss dance, and to recover the profits  
24 rightfully owed to them.

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## FIRST CAUSE OF ACTION

## **(For Direct Infringement of Copyright Against All Defendants)**

37. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1 through 23, above, as though fully set forth herein.

38. On May 20, 2017, after previously obtaining widespread notoriety for his Instagram dance videos, Backpack Kid and his Floss dance exploded in popularity after he performed the Floss on Saturday Night Live with Katy Perry. Backpack Kid also performed The Floss in Katy Perry's 2017 "Swish Swish" music video, which was posted to YouTube.

39. Backpack Kid is the undisputed creator of the wildly popular and immediately recognizable Floss Dance. Backpack Kid's 2016 Instagram videos depicting R.H performing the Floss are the original depictions of the Floss or Flossing.

40. Plaintiffs are in the process of registering the Floss with the United States Copyright Office. On July 30, 2018 and October 22, 2018, Plaintiffs submitted applications for copyright registrations, which were assigned Copyright Office case numbers 1-6803798591 and 1-7053827951, respectively.

41. In NBA 2K18 and NBA 2K19, players can have their characters perform Backpack Kid's dance within the game. In fact, the in-game dance is also named Backpack. Defendants have infringed and continue to infringe Plaintiffs' copyrights in the Floss by offering the Backpack dance emote that, if purchased, a player can use to make his or her avatar perform during 2K gameplay; substantially copying the Floss in digital form to the 2K games; advertising the Floss under the

1 name Backpack in its promotional materials; and creating the  
2 Backpack emote as a derivative work of the Floss.

3 42. Defendants did not seek to obtain Plaintiffs' permission for  
4 its use of the Floss for the Floss emote. Nor have Defendants  
5 compensated or credited Backpack Kid for their use of the Floss.

6 43. Moreover, Defendants actively and knowingly directed,  
7 caused, induced, and encouraged others, including, but not limited to,  
8 its players, designers, suppliers, distributors, resellers, software  
9 developers, and repair providers, to misappropriate Backpack Kid's  
10 likeness and the Floss.

11 44. Defendants' acts of infringement have been willful,  
12 intentional, and purposeful, in disregard of and with indifference to  
13 Plaintiffs' rights.

14 45. Defendants' willful and continued unauthorized use of the  
15 Floss for commercial gain has caused and will continue to cause  
16 confusion and mistaken belief by leading the public to erroneously  
17 associate the Floss with NBA 2K18 and NBA 2K19 in violation of 17  
18 U.S.C. §§ 101 et seq.

19 46. As a result of Defendants' conduct, Plaintiffs have been  
20 damaged by being precluded from receiving their rightful share of the  
21 profits earned by Defendants for their improper and unlicensed use of  
22 Plaintiffs' exclusive copyrights in the Backpack emote.

23 47. Plaintiffs are entitled to permanent injunctive relief  
24 preventing Defendants, and their officers, agents, and employees, and  
25 all related persons from further using the Floss and engaging in other  
26 acts in violation of Copyright law.

27 48. As a direct and proximate result of Defendants'  
28 infringement of Plaintiffs' copyrights and exclusive rights under

1 copyright, Plaintiffs are also entitled to recover damages, including  
2 attorneys' fees, and any profits obtained by Defendants as a result of  
3 the infringements alleged above, in an amount according to proof to be  
4 determined at the time of trial.

5           49. In doing the acts herein alleged, Defendants acted  
6 fraudulently, willfully, and with malice, and Plaintiffs are therefore  
7 entitled to punitive damages according to proof at the time of trial.

## SECOND CAUSE OF ACTION

**(For Contributory Infringement of Copyright Against All  
Defendants)**

11           50. Plaintiffs hereby repeat and reallege the allegations set  
12 forth in paragraphs 1 through 36, above, as though fully set forth  
13 herein.

14       51. Plaintiffs are in the process of registering the Floss with the  
15       United States Copyright Office. On July 30, 2018 and October 22, 2018,  
16       Plaintiffs submitted applications for copyright registrations, which  
17       were assigned Copyright Office case numbers 1-6803798591 and 1-  
18       7053827951, respectively.

19        52. In NBA 2K18 and NBA 2K19, players can have their  
20 characters perform the dance within the game. In fact, the in-game  
21 dance is also named the Backpack (a clear reference to Backpack Kid).  
22 Defendants have infringed and continue to infringe Plaintiffs'  
23 copyrights in the Floss by offering the Backpack dance emote that, if  
24 purchased, a player can use to make his or her avatar perform during  
25 2K gameplay; substantially copying the Floss in digital form to the 2K  
26 games; advertising the Floss in its promotional materials; and creating  
27 the Backpack emote as a derivative work of the Floss.

1       53. By providing the Backpack emote necessary for its players  
2 to commit direct copyright infringement, Defendants have and continue  
3 to materially contribute to the unauthorized reproductions and  
4 distributions by its players of the Floss.

5       54. Defendants did not seek to obtain Plaintiffs' permission for  
6 its use of the Floss for the Backpack emote. Nor have Defendants  
7 compensated or credited Backpack Kid for their use of the Floss.

8       55. Moreover, Defendants actively and knowingly directed,  
9 caused, induced, and encouraged others, including, but not limited to,  
10 its players, designers, suppliers, distributors, resellers, software  
11 developers, and repair providers, to misappropriate Backpack Kid's  
12 likeness and the Floss.

13       56. Defendants' acts of infringement have been willful,  
14 intentional, and purposeful, in disregard of and with indifference to  
15 Plaintiffs' rights.

16       57. Defendants' willful and continued unauthorized use of the  
17 Floss has caused and will continue to cause confusion and mistaken  
18 belief by leading the public to erroneously associate the Floss with 2K18  
19 and 2K19 in violation of 17 U.S.C. §§ 101 et seq.

20       58. As a result of Defendants' conduct, Plaintiffs have been  
21 damaged by being precluded from receiving his rightful share of the  
22 profits earned by Defendants for their improper and unlicensed use of  
23 Plaintiffs' exclusive copyrights in the Backpack emote.

24       59. Defendants' conduct is causing and, unless enjoined and  
25 restrained by this Court, will continue to cause Plaintiffs great and  
26 irreparable injury that cannot be compensated or measured in money.  
27 Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. §  
28

1 502, Plaintiffs are entitled to injunctive relief, prohibiting further  
2 contributory infringements of Plaintiffs' copyrights.

3 60. As a direct and proximate result of Defendants'  
4 infringement of Plaintiffs' copyrights and exclusive rights under  
5 copyright, Plaintiffs are also entitled to recover damages, including  
6 attorneys' fees, and any profits obtained by Defendants as a result of  
7 the infringements alleged above, in an amount according to proof to be  
8 determined at the time of trial.

9 61. In doing the acts herein alleged, Defendants acted  
10 fraudulently, willfully, and with malice, and Plaintiffs are therefore  
11 entitled to punitive damages according to proof at the time of trial.

### 12 **THIRD CAUSE OF ACTION**

#### 13 **(For Violation of the Right of Publicity Under California 14 Common Law Against All Defendants)**

15 62. Plaintiffs hereby repeat and reallege the allegations set  
16 forth in paragraphs 1 through 48, above, as though fully set forth  
17 herein.

18 63. Through their use of the Floss as an in-game dance emote  
19 that can be purchased as the emote of the same name, Defendants  
20 misappropriated Backpack Kid's identity. The Backpack emote depicts  
21 Backpack Kid performing the Floss.

22 64. Upon information and belief, Defendants created the  
23 Backpack emote by capturing and digitally copying Backpack Kid  
24 performing the Floss. Defendants then utilized the digital copy to  
25 create code that, if purchased, allows player avatars to perform the  
26 Floss.

27 65. Defendants did not seek or obtain Plaintiffs' authorization  
28 or consent for its use of Backpack Kid's likeness or the Floss for the

1 Backpack emote. Nor have Defendants compensated or credited  
2 Backpack Kid for their use of his likeness or the Floss.

3 66. Defendants used Backpack Kid's likeness to generate  
4 significant wealth by: 1) selling the infringing Backpack emote directly  
5 to players; 2) selling NBA 2K18 and NBA 2K19 that contain the  
6 Backpack emote; 3) advertising the Backpack emote to attract  
7 additional players, including Backpack Kid's fans or those persons  
8 familiar with the Floss to play NBA 2K18 and NBA 2K19 and make in-  
9 game purchases; 4) keeping the franchise relevant to its players to  
10 incentivize those players to continue purchasing the 2K games; 5)  
11 impliedly representing that Plaintiffs consented to Defendants' use of  
12 Backpack Kid's likeness; 6) erroneously causing the association of NBA  
13 2K18 and NBA 2K19 with the Floss; 7) creating the false impression  
14 that Plaintiffs endorsed NBA 2K18 and NBA 2K19; and 8) inducing  
15 and/or contributing to NBA 2K18 and NBA 2K19 players' characters  
16 performing the Floss dance.

17 67. As a performance artist, Backpack Kid exploits his identity  
18 by performing in shows, events, and with the media. Backpack Kid was  
19 damaged by Defendants' conduct as he was prevented from reaping the  
20 profits of licensing his likeness or the Floss to Defendants.

21 68. Defendants' conduct caused and will continue to cause  
22 confusion and mistaken belief by leading the public to erroneously  
23 believe that Plaintiffs consented to the use of Backpack Kid's likeness  
24 in NBA 2K18 and NBA 2K19.

25 69. Plaintiffs are entitled to permanent injunctive relief  
26 preventing Defendants, and their officers, agents, and employees, and  
27 all related persons from further using Backpack Kid's likeness or the  
28 Floss.

70. Plaintiffs are also entitled to recover damages, including any profits obtained by Defendants as a result of the infringements alleged above, in an amount according to proof to be determined at the time of trial.

## FOURTH CAUSE OF ACTION

**(For Violation of the Right of Publicity Under Cal. Civ. Code §  
3344 Against All Defendants)**

71. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1 through 57, above, as though fully set forth herein.

72. Through their use of Backpack name and Floss dance as an in-game dance emote, Defendants misappropriated Backpack Kid's identity. In NBA 2K18 and NBA 2K19, players can have their characters perform the Floss dance within the game. In fact, the in-game dance is also named the Backpack.

73. Defendants did not seek or obtain Plaintiffs' authorization or consent for its use of Backpack Kid's likeness or the Floss for the Backpack emote. Nor have Defendants compensated or credited Backpack Kid for their use of his likeness or the Floss.

74. Defendants used Backpack Kid's likeness to generate significant wealth by: 1) selling the infringing Backpack emote directly to players; 2) selling NBA 2K18 and NBA 2K19 that contain the Backpack emote; 3) advertising the Backpack emote to attract additional players, including Backpack Kid's fans or those persons familiar with the Floss to play NBA 2K18 and NBA 2K19 and make in-game purchases; 4) keeping the franchise relevant to its players to incentivize those players to continue purchasing the 2K games; 5) impliedly representing that Plaintiffs consented to Defendants' use of

1 Backpack Kid's likeness; 6) erroneously causing the association of NBA  
2 2K18 and NBA 2K19 with the Floss; 7) creating the false impression  
3 that Plaintiffs endorsed NBA 2K18 and NBA 2K19; and 8) inducing  
4 and/or contributing to NBA 2K18 and NBA 2K19 players' characters  
5 performing the Floss dance.

6 75. As a performance artist, Backpack Kid exploits his identity  
7 by performing in shows, events, and with the media. Backpack Kid was  
8 damaged by Defendants' conduct as he was prevented from reaping the  
9 profits of licensing his likeness or the Floss to Defendants.

10 76. Defendants' conduct caused and will continue to cause  
11 confusion and mistaken belief by leading the public to erroneously  
12 believe that Plaintiffs consented to the use of Backpack Kid's likeness  
13 in NBA 2K18 and NBA 2K19.

14 77. Plaintiffs are entitled to permanent injunctive relief  
15 preventing Defendants, and their officers, agents, and employees, and  
16 all related persons from further using Backpack Kid's likeness or the  
17 Floss.

18 78. Plaintiffs are also entitled to recover damages, including any  
19 profits obtained by Defendants as a result of the infringements alleged  
20 above, in an amount according to proof to be determined at the time of  
21 trial.

## 22 FIFTH CAUSE OF ACTION

### 23 (Unfair Competition Under Cal. Bus. & Prof. Code § 17200)

24 79. Plaintiffs hereby repeat and reallege the allegations set  
25 forth in paragraphs 1 through 65, above, as though fully set forth  
26 herein.

27 80. By misappropriating the Backpack Kid name and Floss  
28 dance, and Backpack Kid's likeness, Defendants have engaged in

1 business acts or practices that constitute unfair competition in violation  
2 of Cal. Bus. & Prof. Code. § 17200.

3 81. As a result of Defendants' violations, Defendants have  
4 unjustly enriched themselves by: 1) selling the infringing Backpack  
5 emote directly to players; 2) selling NBA 2K18 and NBA 2K19 that  
6 contain the Backpack emote; 3) advertising the Backpack emote to  
7 attract additional players, including Backpack Kid's fans or those  
8 persons familiar with the Floss to play NBA 2K18 and NBA 2K19 and  
9 make in-game purchases; 4) keeping the franchise relevant to its  
10 players to incentivize those players to continue purchasing the 2K  
11 games; 5) impliedly representing that Plaintiffs consented to  
12 Defendants' use of Backpack Kid's likeness; 6) erroneously causing the  
13 association of NBA 2K18 and NBA 2K19 with the Floss; 7) creating the  
14 false impression that Plaintiffs endorsed NBA 2K18 and NBA 2K19;  
15 and 8) inducing and/or contributing to NBA 2K18 and NBA 2K19  
16 players' characters performing the Floss dance.

17 82. Plaintiffs have been damaged by Defendants' conduct as  
18 Plaintiffs were prevented from reaping the profits of licensing Backpack  
19 Kid's likeness or the Floss to Defendants.

20 83. Plaintiffs are entitled to permanent injunctive relief  
21 preventing Defendants, and their officers, agents, and employees, and  
22 all related persons from further using Backpack Kid's likeness and  
23 Plaintiffs' trademark in the Backpack Kid name and copyright in the  
24 Floss dance.

25 84. Plaintiffs are also entitled to recover damages, including any  
26 profits obtained by Defendants as a result of the infringements alleged  
27 above, in an amount according to proof to be determined at the time of  
28 trial.

## SIXTH CAUSE OF ACTION

**(False Designation of Origin Under 15 U.S.C. § 1125(a))**

85. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1 through 71, above, as though fully set forth herein.

86. Since creating the Floss and performing it on Saturday Night Live, Backpack Kid and his Floss dance have exploded in popularity. The Floss has become synonymous with Backpack Kid, who is unanimously credited with creating the dance. Backpack Kid has also been interviewed several times about the creation of the Floss and how to properly perform it. Accordingly, the Floss is a part of Backpack Kid's identity and the dance's unique movements readily evoke imagery of Backpack Kid's popular Instagram videos and famous Saturday Night Live performance.

87. In NBA 2K18 and NBA 2K19, players can have their characters perform the Floss dance within the game. In fact, the in-game dance is also named the Backpack. Through Defendants' unauthorized use of the "Backpack" name and Floss dance in 2K18 and 2K19, Defendants have misappropriated Backpack Kid's name and likeness, and Plaintiffs' copyright and trademark.

88. Moreover, Plaintiffs are damaged by Defendants' exploitation of his name and likeness through 1) selling the infringing Backpack emote directly to players; 2) selling NBA 2K18 and NBA 2K19 that contain the Backpack emote; 3) advertising the Backpack emote to attract additional players, including Backpack Kid's fans or those persons familiar with the Floss to play NBA 2K18 and NBA 2K19 and make in-game purchases; 4) keeping the franchise relevant to its players to incentivize those players to continue purchasing the 2K

1 games; 5) impliedly representing that Plaintiffs consented to  
2 Defendants' use of Backpack Kid's likeness; 6) erroneously causing the  
3 association of NBA 2K18 and NBA 2K19 with the Floss; 7) creating the  
4 false impression that Plaintiffs endorsed NBA 2K18 and NBA 2K19;  
5 and 8) inducing and/or contributing to NBA 2K18 and NBA 2K19  
6 players' characters performing the Floss dance.

7 89. As a result of Defendants' conduct, Plaintiffs have been  
8 damaged by being precluded from receiving their rightful share of the  
9 profits from selling or licensing the Backpack Kid name and Floss  
10 dance.

11 90. Moreover, Plaintiffs were damaged by Defendants' conduct  
12 as they were prevented from reaping the profits of licensing the  
13 Backpack Kid name and Floss dance to Defendants for commercial gain.

14 91. Plaintiffs are entitled to permanent injunctive relief  
15 preventing Defendants, and their officers, agents, and employees, and  
16 all related persons from further using the Backpack Kid name and Floss  
17 dance.

18 92. Plaintiffs are also entitled to recover damages, including any  
19 profits obtained by Defendants as a result of the infringements alleged  
20 above, in an amount according to proof to be determined at the time of  
21 trial.

## 22 **SEVENTH CAUSE OF ACTION**

### 23 **(Trademark Infringement Under California Common Law)**

24 93. Plaintiffs hereby repeat and reallege the allegations set  
25 forth in paragraphs 1 through 79, above, as though fully set forth  
26 herein.

27 94. Since Backpack Kid's creation of the Floss in 2016 and its  
28 rise to fame soon after, Backpack Kid exploded in popularity.

1 Accordingly, since 2016, Backpack Kid has used, and thereby owns,  
 2 common law trademark rights in Backpack Kid.

3 95. The Backpack Kid name is distinctive and has acquired  
 4 distinctiveness through Plaintiffs' continuous and widespread use of the  
 5 Backpack Kid name and dance in concerts, performances and videos in  
 6 the United States and worldwide.

7 96. In NBA 2K18 and NBA 2K19, players can have their  
 8 characters perform the dance within the game. In fact, the in-game  
 9 dance is also named the Backpack. Through Defendants' unauthorized  
 10 use of the Backpack Kid name and dance in 2K18 and 2K19, Defendants  
 11 have misappropriated Plaintiffs' trademark.

12 97. Moreover, Plaintiffs are damaged by Defendants'  
 13 exploitation of the Backpack Kid name through 1) selling the infringing  
 14 Backpack emote directly to players; 2) selling NBA 2K18 and NBA 2K19  
 15 that contain the Backpack emote; 3) advertising the Backpack emote to  
 16 attract additional players, including Backpack Kid's fans or those  
 17 persons familiar with the Floss to play NBA 2K18 and NBA 2K19 and  
 18 make in-game purchases; 4) keeping the franchise relevant to its  
 19 players to incentivize those players to continue purchasing the 2K  
 20 games; 5) impliedly representing that Plaintiffs consented to  
 21 Defendants' use of Backpack Kid's likeness; 6) erroneously causing the  
 22 association of NBA 2K18 and NBA 2K19 with the Floss; 7) creating the  
 23 false impression that Plaintiffs endorsed NBA 2K18 and NBA 2K19;  
 24 and 8) inducing and/or contributing to NBA 2K18 and NBA 2K19  
 25 players' characters performing the Floss dance.

26 98. As a result of Defendants' conduct, Plaintiffs have been  
 27 damaged by being precluded from receiving their rightful share of the  
 28

1 profits from selling or licensing the Backpack Kid name and Floss  
2 dance.

3 99. Moreover, Plaintiffs were damaged by Defendants' conduct  
4 as they were prevented from reaping the profits of licensing the  
5 Backpack Kid name and Floss dance to Defendants for commercial gain.

6 100. Plaintiffs are entitled to permanent injunctive relief  
7 preventing Defendants, and their officers, agents, and employees, and  
8 all related persons from further using the Backpack Kid name and Floss  
9 dance.

10 101. Plaintiffs are also entitled to recover damages, including any  
11 profits obtained by Defendants as a result of the infringements alleged  
12 above, in an amount according to proof to be determined at the time of  
13 trial.

14 **EIGHTH CAUSE OF ACTION**

15 **(Trademark Infringement Under 15 U.S.C. § 1125(a))**

16 102. Plaintiffs hereby repeat and reallege the allegations set  
17 forth in paragraphs 1 through 88, above, as though fully set forth  
18 herein.

19 103. Defendants' unauthorized use of the Backpack Kid name  
20 and dance in 2K18 and 2K19 constitutes infringement in violation of  
21 the Lanham Act, 15. U.S.C. § 1125(a), et seq., and has caused  
22 substantial and irreparable injury to Backpack Kid's reputation and  
23 goodwill.

24 104. As a direct and proximate result of Defendants' trademark  
25 infringement, Plaintiffs are entitled to permanent injunctive relief  
26 preventing Defendants, and their officers, agents, and employees, and  
27 all related persons from further using the Backpack Kid name and  
28 dance.

105. Plaintiffs are also entitled to recover damages, including any profits obtained by Defendants as a result of the infringements alleged above, in an amount according to proof to be determined at the time of trial.

106. Defendants' acts have been deliberate, willful, and intentional and purposeful to exploit Backpack Kid's celebrity and popularity of the Backpack Kid name and dance.

107. Defendants threaten to continue to advertise, promote, market, sell and offer for sale the Backpack Kid emote using the same name as Plaintiffs' mark, and unless and restrained and enjoined, will continue to do so to Plaintiffs' irreparable damage.

108. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot be compensated or measured in money. Plaintiffs thus have no adequate remedy at law and are entitled to injunctive relief, prohibiting further infringements of Plaintiffs' trademark.

109. In addition, Plaintiffs have incurred costs and attorneys' fees to bring this action.

## NINTH CAUSE OF ACTION

## (Trademark Dilution Under 15 U.S.C. § 1125(c))

110. Plaintiffs hereby repeat and reallege the allegations set forth in paragraphs 1 through 109, above, as though fully set forth herein.

111. By virtue of the prominent and continuous use of the Backpack Kid mark, Plaintiffs' mark has become distinctive and famous within the meaning of 15 U.S.C. § 1125(c).

112. Defendants' conduct dilutes the distinctive quality of Plaintiffs' mark in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

113. Defendants' conduct and actions have lessened the capacity of Plaintiffs' mark as Defendants did not credit Backpack Kid nor seek his consent to use the Backpack Kid trademark.

114. Defendants' acts have been deliberate, willful, and intentional and purposeful to exploit Backpack Kid's celebrity and popularity of the Backpack Kid name and Floss dance.

115. Defendants threaten to continue to advertise, promote, market, sell and offer for sale the Floss emote using the same name as Plaintiffs' mark, and unless and restrained and enjoined, will continue to do so to Plaintiffs' irreparable damage.

116. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot be compensated or measured in money. Plaintiffs thus have no adequate remedy at law and are entitled to injunctive relief, prohibiting further dilution of Plaintiffs' trademark.

117. In addition, Plaintiffs have incurred costs and attorneys' fees to bring this action.

## PRAYER FOR RELIEF

### **As to the First Cause of Action:**

1. For an order restraining Defendants from using, selling, or displaying Plaintiffs' copyright in NBA 2K18 and NBA 2K19;

2. For an award of damages according to proof;

### 3. For punitive and/or exemplary damages:

4. For attorney's fees and costs:

1 **As to the Second Cause of Action:**

2       5. For an order restraining Defendants from using, selling, or  
3 displaying Plaintiffs' copyright in NBA 2K18 and NBA 2K19;

4       6. For an award of damages according to proof;

5       7. For punitive and/or exemplary damages;

6       8. For attorney's fees and costs;

7 **As to the Third Cause of Action:**

8       9. For an order restraining Defendants from using Backpack  
9 Kid's likeness in NBA 2K18 and NBA 2K19;

10      10. For an award of damages according to proof;

11 **As to the Fourth Cause of Action:**

12      11. For an order restraining Defendants from using, selling, or  
13 displaying Plaintiffs' copyright and likeness in NBA 2K18 and NBA  
14 2K19;

15      12. For an award of damages according to proof; and

16      13. For punitive and/or exemplary damages;

17 **As to the Fifth Cause of Action:**

18      14. For an order restraining Defendants from using, selling, or  
19 displaying Plaintiffs' copyright and likeness in NBA 2K18 and NBA  
20 2K19;

21      15. For an award of damages according to proof; and

22 **As to the Sixth Cause of Action:**

23      16. For an order restraining Defendants from using, selling, or  
24 displaying Backpack Kid's likeness in NBA 2K18 and NBA 2K19;

25      17. For an award of damages according to proof;

26      18. For punitive and/or exemplary damages;

27      19. For attorney's fees and costs;

### **As to the Seventh Cause of Action:**

20. For an order restraining Defendants from using, selling, or displaying Plaintiffs' trademark in NBA 2K18 and NBA 2K19;

21. For an award of damages according to proof;

## **As to the Eighth Cause of Action:**

20. For an order restraining Defendants from using, selling, or displaying Plaintiffs' trademark in NBA 2K18 and NBA 2K19;

21. For an award of damages according to proof;

## **As to the Ninth Cause of Action:**

20. For an order restraining Defendants from using, selling, or displaying Plaintiffs' trademark in NBA 2K18 and NBA 2K19;

21. For an award of damages according to proof;

## **As to All Causes of Action:**

22. For costs of suit; and

23. For such other and further relief as the Court may deem proper.

Dated: December 17, 2018

Respectfully Submitted,

# Pierce Bainbridge Beck Price & Hecht LLP

By: /s/Carolynn Kyungwon Beck

# Carolynn Kyungwon Beck

*Attorneys for Plaintiffs*

## JURY TRIAL

Plaintiffs request a trial by jury on all issues to which it is entitled a jury.

Dated: December 17, 2018

Respectfully Submitted,

# Pierce Bainbridge Beck Price & Hecht LLP

By: /s/Carolynn Kyungwon Beck  
Carolynn Kyungwon Beck

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